



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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April 4, 2016

David Webster, Chief
Water Permits Branch
USEPA Region 1
5 Post Office Square
Mail Code: OEP06-01
Boston, MA 02109-3912

Re: Section 401 Water Quality Certification for the General Permit for Stormwater Discharges
From Small Municipal Separate Storm Sewer System in Massachusetts

Dear Mr. Webster:

US EPA Region 1 has requested the Massachusetts Department of Environmental Protection ("MassDEP") to issue a water quality certification pursuant to Section 401(a) of the Federal Clean Water Act ("Act") and 40 CFR 124.53 for the above referenced NPDES permit. MassDEP has been working closely with you and your colleagues at EPA Region 1 on the development and finalization of this permit. In our discussions, MassDEP has consistently maintained that MS4 requirements rest on the "maximum extent practicable" ("MEP") standard set forth in section 402(p) (3) (B) (iii) of the Act, 33 U.S.C. § 1342(p)(3)(B)(iii). Thus, while the Phase II regulations and the final MS4 permit indicate numerous ways in which small MS4s communities should control their storm water discharges, the MS4s are not, in the end, required to do anything that is not "practicable."

While MassDEP would have preferred some time for additional discussion of important issues, it has decided to co-issue the permit with EPA Region 1 in order to continue to be involved with EPA and cities and towns on how this permit is implemented. This is too important an issue for our environment, for our cities and towns and for the Commonwealth. As you know, MassDEP has been working with a number of communities and coalitions to provide technical assistance and to expand areas where innovative thinking and collaboration can help cities and towns comply. MassDEP has encouraged opportunities to engage in detail with EPA and our municipal partners on EPA's intentions for implementation of the final permit. There will need to be much more discussion about how this permit is implemented.

In its 2015 comments on the draft permit, MassDEP expressed support for many of EPA Region 1's goals aimed at protecting the Commonwealth's water resources. MassDEP also raised significant concerns about the administrative burdens and costs imposed by the proposed permit and the need to better harmonize EPA Region 1's proposed conditions with the Massachusetts Stormwater Standards. MassDEP appreciates that significant changes have been made in response to MassDEP's and stakeholder's comments. I have summarized below some of the concerns the agencies have been discussing.

Costs

The final permit has an effective date of July 1, 2017 to give communities time to prepare for implementation and in recognition of municipal budgeting timelines. The final permit also provides an additional year for the submission of certain required plans and provides more flexibility with regard to timing on mapping and other elements associated with illicit discharge detection requirements.

Other aspects of the final permit will continue to raise questions regarding interpretation. Cost will continue to be a major consideration for MassDEP and the communities. EPA Region 1 estimates that the costs of implementing the new permit (not including capital costs and not including communities implementing TMDL requirements) to range from \$10,000 per year for smaller systems to up to \$300,000 for larger systems. It is incumbent on all of us to be flexible and collaborative with the municipalities as the new requirements become effective.

Legal

In our continued dialogue with EPA Region 1, MassDEP has reiterated the need for clarity regarding EPA's interpretation of the provisions of the Act. The framework of the previous permit, adopted in 2003, relied upon municipalities reducing stormwater pollution by implementing specified Best Management Practices ("BMPs") and the state and federal governments monitoring receiving waters over time to measure the effectiveness of that permit. MassDEP understands that the final permit continues to call for municipalities to implement an iterative process using BMPs, assessment, and refocused BMPs, which takes into consideration what is technically and economically feasible (i.e., "practicable"), leading toward the goal of attainment of water quality standards.

As noted in our previous comment letter, the draft permit was written to include water quality based effluent limitations in addition to the BMP-based program with a maximum extent practicable standard. In the final permit, EPA Region 1 has sought to clarify its position that a permittee's compliance with the applicable requirements and BMP implementation schedules in Appendix F constitutes compliance with the permit. MassDEP is encouraged by these changes, and it will continue to work with EPA Region 1 as issues concerning compliance arise. Except as provided by the state conditions set forth below, MassDEP understands the permit to require compliance with the water quality based effluent limitations to the maximum extent practicable, in accordance with CWA section 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii).

Implementation

MassDEP agrees with EPA Region 1 that scientific advances since 2003 indicate that increased infiltration of stormwater on-site is an effective strategy to reduce stormwater pollution.

MassDEP also agrees that attention to addressing illicit discharges is important in improving water quality.

MassDEP has identified over 200 separate actions (not including those for impaired waters and TMDL goals) required by the permit which will require municipalities to spend considerable time, energy and resources on reports and other administrative tasks, a significant increase over the requirements in the 2003 permit. We have specifically highlighted the following implementation concerns:

- How educational programs should be presented, including requirements for municipalities to measure effectiveness;
- How municipalities should conduct Illicit Discharge Detection and Elimination programs, including a several step, highly detailed prioritization system;
- Extensive construction period reviews to now be undertaken by municipalities;
- A new set of federal post-construction stormwater requirements that will be different in some respects from the Massachusetts Stormwater Standards used by all 351 Massachusetts municipalities since 1997; and
- Extensive requirements for Good Housekeeping which direct municipalities to develop written stormwater standard operating procedures that apply to multiple municipal facilities.

Through our formal comments and informal discussions with EPA Region 1, MassDEP has provided feedback about the cost and administrative requirements of the permit – many municipalities have done the same. In those interactions we have urged EPA Region 1 to minimize requirements that do not have a direct relationship to stormwater pollution reductions, to consolidate and streamline as much as possible, and we also provided examples of some of those requirements. MassDEP is encouraged with some of the changes made as a result of those conversations and will continue to work with EPA Region 1 as issues on what constitutes implementation arise.

Addressing water quality impairments, especially in more densely populated areas, is a complex challenge that requires ongoing attention and a willingness to assess what is working and to be open about how to achieve compliance. Very significant issues about implementation that were raised by MassDEP and communities in good faith will continue to be discussed as implementation of the permit requirements moves forward.

State conditions

Consistent with MassDEP's position that the final permit reflects a BMP-based approach under the "maximum extent practicable" standard, the requirements of the antidegradation provisions in 314 CMR 4.04 are met for new and increase discharges that do not discharge to an Outstanding Resource Water, provided that BMPs are implemented consistent with the

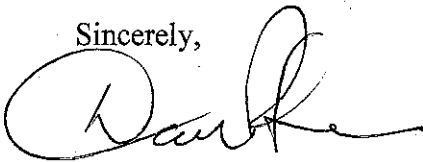
Massachusetts Stormwater Handbook. New or increased discharges to Outstanding Resource Waters shall require approval by MassDEP in accordance with MassDEP's Implementation Procedures for the Antidegradation Provisions of the Massachusetts Surface Water Quality Standards, 314, CMR 4.00, effective October 21, 2009.

For compliance with part 2.3.6., of the permit, each permittee's new development and redevelopment program shall meet the specifications of the Massachusetts Stormwater Handbook.

MassDEP has determined that the conditions of the permit and attached state conditions will achieve compliance with those sections 208(e), 301, 302, 303, 306 and 307 of the Federal Act, which EPA Region 1 purports are applicable, and with applicable provisions of state law, including the antidegradation provisions of the Massachusetts Surface Water Quality Standards, 314 CMR 4.04, and MassDEP's Implementation Procedures for the Antidegradation Provisions of the Massachusetts Surface Water Quality Standards, 314, CMR 4.00, effective October 21, 2009. The Department, accordingly, hereby certifies the draft of the proposed final permit.

In implementing this permit, MassDEP will continue to work with EPA Region 1 and communities as they work to comply with these new requirements and evaluate the effectiveness of BMPs while striving to attain water quality standards. MassDEP is committed to assist with the implementation challenges raised by this agency and the communities subject to the final permit.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Ferris", with a large, stylized loop at the end.

David Ferris, Director
Massachusetts Wastewater Management Program
Bureau of Resource Protection